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No. 84-1363

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

THE COMMONWEALTH OF MASSACHUSETTS
by its DEPARTMENT OF PUBLIC WELFARE,
Petitioner,

v.

SECRETARY OF THE UNITED STATES
DEPARTMENT OF HEALTH AND
HUMAN SERVICES, et al.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of
Appeals for the First Circuit

SUPPLEMENTAL AND REPLY BRIEF FOR THE PETITIONER

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Mistaking the issues presented, the Secretary wrongly argues that the petitioner's claims were rejected in a recent decision by this Court. Misconstruing the petitioner's argument, the Secretary

slights its purpose, and concludes incorrectly that her position is consistent with the purpose and policy of the Medicaid Act. The Secretary's argument notwithstanding, the issues presented in this case are now as pressing, and as deserving of review by this Court, as they were at the beginning of the Term.

1. The Commonwealth contests the Secretary's determination that the sum in issue in this case constitutes an overpayment, not her power to recover the sum immediately if her determination is correct. Compare Secretary's Memorandum at 1 with, e.g., Petition at 43-44; Pet. App. at 18-20 (summary of petitioner's argument by the Court of Appeals).

The sum in issue was indisputably expended by the Commonwealth at rates determined in accordance with an approved state plan for purposes stated in the plan, i.e., to purchase medical care for needy persons.[1/] Despite that fact, the Secretary refuses to contribute the federal share of the petitioner's expenditures.

Thus, this case does not involve any dispute as to whether Medicaid funds were expended in violation of grant condi-

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1/ Contrary to the Secretary's Memorandum at 3, the petitioner does not argue that payments to providers become "overpayments" for purposes of § 1396b(d)(2) to the extent that they are recovered from the providers. Rather, the expenditures were proper when made, and so the federal share of them cannot be an overpayment. However, rate decrease claims which are actually recovered from providers may be treated as if they were overpayments because § 1396b(d)(3) so provides. See Pet. App. at 127.

tions, cf. Bennett v. Kentucky Department of Education, 53 L.W. 4333, 105 S.Ct. 1544 (1985), or to purchase services not covered by the Medicaid Act, cf. Connecticut Department of Income Maintenance v. Heckler, No. 83-2136, decided May 20, 1985. Rather, it directly concerns the "cornerstone" of the Medicaid Act, the provision of federal financial assistance "for all legitimate state expenditures under an approved Medicaid plan." See Harris v. McRae, 448 U.S. 297, 308 (1981), citing 42 U.S.C. § 1396b(a)(1).

2. Contrary to the Secretary's Memorandum in Opposition at 5, 7, the petitioner claims both that the Secretary's refusal to contribute the federal share of the Commonwealth's expenditures is a flat violation of federal law, to wit 42

U.S.C. § 1396b(a)(1), see Petition at 30-41, and that the Secretary has exercised whatever authority she may have in a completely arbitrary way, in violation of the spirit of the partnership relationship, and of the "clear statement" rule first articulated in Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17 (1978). See Petition at 23-28, 41-53.

Bennett v. Kentucky Department of Education does not foreclose the latter argument. In Bennett, the Court ruled that the clear statement rule was satisfied because there was no ambiguity as to the existence of a condition that grant funds be used to supplement rather than supplant state and local education funds. 53 L.W. at 4335, 105 S.Ct. at

1550. Nevertheless, the Court left open the question whether in a disallowance proceeding the Secretary's power to construe grant conditions could be invoked to impose liability in a way that frustrates the state's reasonable expectations. 53 L.W. at 4336, 105 S. Ct. at 1553. See also Bennett v. New Jersey, 53 L.W. 4337, 4339-40, 105 S. Ct. 1555, 1559-61 (1985) (law in effect when grant is made governs its use).[2/]

Both Pennhurst and Bennett operate against the Secretary's position in this

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2/ In both Bennett v. Kentucky Department of Education and Connecticut Department of Income Maintenance v. Heckler, the Court concluded that the statutes in question clearly supported the federal position. Thus there was no occasion to apply the rule of statutory construction articulated in Pennhurst, or the rule of contract interpretation articulated in Bennett.

case. First, since § 1396b(a)(1) promises "federal financial assistance for all legitimate state expenditures under an approved Medicaid plan," Harris v. McRae, 448 U.S. at 308, the Secretary's refusal to contribute the federal share of petitioner's expenditures, which were concededly made in accordance with its approved plan, amounts to a qualification of, or condition on the federal obligation on the basis of unclear statutory authority.

The Secretary seeks to minimize the implications of her extraordinary claim by noting that "only" ten other states employ a retrospective rate system, suggesting that only those ten will experience the effects of her position. Secretary's Memorandum at 7. However, even if a surprise condition which "only"

affects one-fifth of all the states can slip under the bar of the clear statement rule, the Secretary's position in this case is not limited to states with retrospective rate systems. The Secretary identifies § 1396b(d)(2) as the source of her authority. See Pet. App. 34; Secretary's Memorandum at 4. If that section authorizes the Secretary to withhold federal financial participation here, it equally authorizes her to withhold participation in any state's expenditures under an approved plan, regardless of the type of rate system employed by the state. The only limit on this power recognized in the decision below is that the Secretary must be able to articulate a plausible, even if post hoc, rationale for denying reimbursement. Pet. App. 32-35. Whether this authority is viewed

as a new condition on the states' right to reimbursement, or as a new qualification of the federal obligation, it represents potentially massive, unforeseeable, and indeterminate liability for the states. Since it is not clearly supported by the Act, this power does not exist.

Further, the Secretary's position in this case is the paradigm of the cases on which this Court reserved judgment in Bennett v. Kentucky Department of Education, 53 L.W. at 4335, 105 S. Ct. at 1553. Since the petitioner expended funds in accordance with its approved plan, it seems beyond question that petitioner could reasonably expect the federal government to contribute its share; neither court below found anything in the Secretary's regulations to be to the

contrary. Pet. App. 25-26, 53. Moreover, the Secretary's own regulations encouraged the expectation that the federal government would participate in the petitioner's expenditures. See Petition 7, 15; Pet. App. 26-27 (citing and discussing regulations stating that federal participation is available for expenditures which do not exceed upper limits). Thus, the Secretary's position is in plain conflict with Pennhurst, and also presents squarely the issue reserved in Bennett.

3. Permeating the Secretary's Memorandum is the innuendo that the petitioner is attempting to postpone repayment of misspent funds. That suggestion is unfounded. That the state rate system has identified these funds as overpay-

ments to nursing homes does not mean that they should never have been spent. The Secretary has never alleged that the rates at which the funds in issue were expended exceeded the upper limits identified by 42 U.S.C. § 1396b(i)(1979), or her regulations. Further, the interim rates at which providers are initially reimbursed under a retrospective system are determined in essentially the same way as final rates are determined in a prospective system. See Petition at 8-10. Consequently, if the same expenditures had been made at the same rates under a prospective system, the Secretary would apparently concede her duty to contribute the federal share.[3/] Thus, the Secretary's claim is perversely

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3/ However, if a state employing a prospective system conducts an audit of a nursing home's books after the fact, the Secretary's theory would permit her to

(footnote continued)

based on the fact that, unlike a prospective system, a retrospective system prevents reimbursement in excess of actual, audited costs.

The Secretary argues that her position is reasonable and fiscally prudent. Be that as it may, it is grossly unfair and unlawful for the Secretary to permit the petitioner to expend funds in reliance upon the Secretary's approval of the state plan, and then to refuse to contribute the federal share of those expenditures on a theory nowhere found

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(footnote continued)

determine that any excess reimbursement revealed in the audit constitutes an "overpayment" to the state. In this circumstance, as in Massachusetts's case, the states that are most conscientious about controlling costs are most likely to feel the sting of the Secretary's peculiar theory.

in the statute or regulations. Furthermore, however rational the Secretary's position may be, it implies a relationship between the federal and state governments vastly different from the partnership described by this Court in Harris v. McRae, 448 U.S. at 308-09. While Congress might rationally have enacted the Secretary's view of that relationship, it chose instead to rely on the states' prudent exercise of their discretion, and to share the costs thereby incurred, subject to specific limits which Congress itself established in § 1396b, and subject of course to the Secretary's power to approve or disapprove the plan under which those costs are incurred. There is nothing in this case to show that that reliance was misplaced.

The decision below, upholding the Secretary's refusal to share the petitioner's legitimate expenditures, merits review by this Court because it endorses a dangerous bid by the Secretary for an authority which negates Congress's purpose and the role of states as partners in the Medicaid program.

Respectfully submitted,

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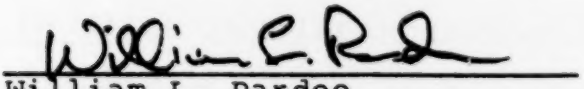

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